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COURT OF APPEAL

5th July, 1991 90.

Before: Sir Godfray Le Quesne, Q.C., (President),
J.M. Chadwick, Esq., Q.C., and
A.C. Hamilton, Esq., Q.C.

Between: **Yani Haryanto** Appellant

And: **E.D. & F. Man (Sugar) Limited** Respondents

Appeal against the Order of the Royal Court (Samedi Division) of 2nd August, 1990, whereby the Court dismissed the appellant's application to set aside the registration in the Royal Court on 18th April, 1990, of a judgment of Mr. Justice Hobhouse in the High Court of Justice, Commercial Court, Queen's Bench Division.

Advocate M.H. Clapham for the appellant.

Advocate J.G. White for the respondent.

JUDGMENT

THE PRESIDENT: On the 4th April, 1990, the respondents to this appeal applied to the Judicial Greffier under Article 4 of the Judgments (Reciprocal Enforcement) (Jersey) Law, 1960, to have registered in the Royal Court a judgment which they had obtained in the High Court in London.

This was a judgment given by Hobhouse J, on 30th November, 1989, under section 26 of the Arbitration Act, 1950. It gave the respondents liberty to enforce against the appellant an arbitrator's award for a sum exceeding $24,000,000. On the 18th April, 1990, the Judicial Greffier ordered that the judgment be registered. On the 11th June, 1990, the appellant issued a summons applying for the registration of the judgment to be set aside. The Royal Court heard his application on the 20th July and on the 2nd August, 1990, dismissed it. It is from that decision of the Royal Court that this appeal is brought.

The appeal is a chapter in a long and complex story. I take a summary of that story from the judgment delivered by Neill, L.J. in proceedings in England to which I shall have to refer.

> "Man are a leading company of international sugar traders based in London. Mr Haryanto is a citizen of Indonesia and is ordinarily resident there where he lives in Jakarta. The judge described him as a man of wealth and influence in Indonesia.
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> In February and March, 1982, Man, as sellers, and Mr Haryanto, as buyer, entered into two contracts for the sale and purchase of sugar. The first contract (7458) was for the sale of 300,000 tonnes of refined white crystal sugar at US$530 per tonne C&F one major safe Indonesian port. Shipment was to be made during the months of October, 1983, to March, 1984, from any world port. The second contract (7527) was for the sale on the same terms of 100,000 tonnes at US$470 per tonne. Both contracts provided that they should be governed by English law and contained an arbitration clause making provision for any disputes to be

submitted to arbitration under the Rules of the Refined Sugar Association in London.

After a time a dispute arose between Man and Mr Haryanto about the two contracts. As did the judge, I shall refer to these contracts as "the disputed contracts". Mr Haryanto contended that his obligation under the disputed contracts was to use his best endeavours to ensure that Badan Urusan Logistik of Jakarta ("Bulog") would enter into contracts to buy the same or approximately the same quantities of sugar but at a higher price than that stipulated in the disputed contracts. He claimed that if Bulog duly entered into such contracts he would be entitled to receive from Man the difference between the price received from Bulog and the prices set out in the disputed contracts but that he was under no further contractual obligation than to use his best endeavours. In particular he denied that there was a relationship of buyer and seller between himself and Man.

Man on the other hand contended that the disputed contracts meant what they said and that Mr Haryanto was under a contractual obligation to buy the sugar, though they accepted that there was a further term that <u>if</u> Bulog subsequently agreed to buy from them the same quantity of sugar for delivery during the same period the disputed contracts would not be further performed and any difference in the total price received by Man would be credited or debited to Mr Haryanto as the case might be.

In the event no contract for the sale of sugar came into existence between Man and Bulog. Man called on Mr Haryanto to open letters of credit himself as stipulated in

the disputed contracts. He failed to open such credits and Man then treated him as being in default.

On 1st June, 1984, Man instituted arbitration proceedings against Mr Haryanto in which they claimed $146m. for damages for breaches of the disputed contracts.

A few weeks later, on 20th June, 1984, Mr Haryanto issued a writ in the Commercial Court (1984 H 2752) claiming, inter alia, a declaration that he was not bound by the disputed contracts and an injunction to restrain Man from proceeding with the arbitration before the Refined Sugar Association.

Mr Haryanto's action came before Staughton J in March, 1985. Pursuant to an interlocutory order made by Lloyd J on 25th July, 1984, the trial, which lasted 11 days, covered only the issues raised by the claims for a declaration and an injunction. On 28th March, 1985, Staughton J gave judgment dismissing these claims: see [1986] 2 Lloyd's Rep 44.

Mr. Haryanto then appealed to the Court of Appeal. The hearing of the appeal took place in February, 1986, and lasted nearly 6 days. On 5th March, 1986, the Court of Appeal dismissed the appeal: see ibid. At the conclusion of the hearing before the Court of Appeal, however, Man asked for and were given leave to serve a cross-notice asking for a declaration. A declaration was then made in the following terms;

> " That [Mr Haryanto] is bound by the contracts contained in or evidenced by contract documents 7458 (dated 12th February, 1982) and 7527 (dated 23rd March, 1982) including the provision therein that all disputes shall be referred to the Council of the

Refined Sugar Association for settlement in accordance with the Rules of the Association relating to Arbitration."

The Court of Appeal gave Mr Haryanto leave to apply within 14 days to vary the terms of this declaration.

Mr Haryanto duly made an application to vary. The application was heard by the Court of Appeal on 26th March, 1986.

It seems that two arguments were put forward on behalf of Mr Haryanto

(a) that the declaration was too wide and went beyond what the Court had decided; and

(b) that the declaration might prevent Mr Haryanto contending before the arbitration tribunal or before a court that the disputed contracts were void or unenforceable for illegality.

The second argument was no doubt linked with the fact that on 25th March, 1986, the day before the Court of Appeal hearing, Mr Haryanto had issued a second writ in the Commercial Court. By this writ he claimed a declaration "that [the disputed contracts], upon which [Man have] commenced arbitration proceedings before the Refined Sugar Association, are unenforceable and/or void as being illegal and\or contrary to English public policy."

The Court of Appeal, after hearing submissions, dismissed the application to vary. The Vice-Chancellor announced the decision in these terms:

" We do not think it necessary to give judgment in this matter. We simply stand by the declaration as asked."

In the present case Steyn J was referred to the transcript of the hearing before the Court of Appeal on 26th March, 1986.

It is convenient to quote a short passage from his judgment where he mentioned what had happened:

" Mr Haryanto duly applied for a variation of the wording to allow him to raise the issue of the illegality of the disputed contracts, by reason of a prohibition on importation of sugar into Indonesia. ..... Not surprisingly, a study of the exchanges in the Court of Appeal revealed that all three members of the Court of Appeal thought that such a plea was no longer open to Mr Haryanto but they also took the view that they were not called [on] to decide the issue."

On 1st May, 1986, Man issued an originating summons in the Commercial Court (1986 E 1034). They sought three declarations including a declaration that Mr Haryanto was estopped from contending in any proceedings against Man that the disputed contracts were unenforceable and\or void as being illegal and\or contrary to English public policy. The alleged estoppel was based on three specified grounds:

(a) that the issues were res judicata having been determined in action 1984 II 2752;
(b) that Mr Haryanto had expressly abandoned these issues in action 1984 II 2752; and
(c) that he was estopped by reason of the Rule in Henderson v Henderson (1843) 3 Hare 100.

On 7th July, 1986, Man and Mr Haryanto entered into a written agreement to settle the outstanding proceedings between them including the arbitration proceedings which

had been started by Man on 1st June, 1984. By this agreement, in which details of the various proceedings were recited, it was provided, inter alia, that Mr Haryanto would pay to Man the sum of US$27m. by instalments of US$5m. on 31st July, 1987, US$9m. on 31st July, 1988, and US$13m. on 31st July, 1989. The agreement contained an accelerator clause entitling Man, in the event that Mr Haryanto failed to comply with his obligations under the agreement, to declare any balance of the US$27m. immediately due and payable. The agreement also contained an arbitration clause and a provision that it should be "governed and construed according to the laws of England."

Mr Haryanto duly paid the first instalment of US$5m. due on 31st July, 1987. He also complied with other terms of the agreement relating to the provision of acknowledgements of debt and the provision of security. On 31st July, 1988, however, Mr Haryanto failed to pay the instalment due on that date of US$9m. Man's solicitors immediately invoked the accelerator clause and by a telex dated 3rd August, 1988, they claimed payment of the remaining balance of US$22m.

Mr Haryanto then started proceedings in Indonesia. On 8th August, 1988, he filed a claim (499/1988) in the Central Jakarta District Court seeking the annulment of the disputed contracts or a declaration that they were null and void on the ground that they were executed for an illegal purpose, namely the importation of sugar into Indonesia by a person other than Bulog. In addition an injunction was claimed to prevent Man taking any action based on the disputed contracts.

On 17th November, 1988, Man filed a claim (736/1988), also in the Central Jakarta District Court, seeking the payment of the instalment of US$9m. payable on 31st July, 1988. In these proceedings Man relied on the terms of the settlement agreement and on the acknowledgement of debt provided by Mr Haryanto in pursuance of that agreement.

On 29th June, 1989, the District Court gave judgment in the two 1988 actions (499 and 736). In summary the Court's decision was to the following effect:

(a) that the disputed contracts were "in conflict with the public welfare and the public policy in Indonesia" and were therefore illegal and without legal effect:

(b) that as the settlement agreement arose from the disputed contracts it also was illegal as being against the public welfare and public policy of Indonesia and accordingly Man could not rely on any acknowledgement of debt or security provided under the settlement agreement;

(c) that Man could not rely on or enforce the declaration of the English Court of Appeal made in March, 1986, because the disputed contracts were in conflict with and violated the laws of Indonesia and therefore the decision of the Court of Appeal was "without the force of law under Indonesian law."

On 14th October, 1989, Man's appeal to the High Court in Jakarta from the judgments of 29th June, 1989, was dismissed. I understand that a further appeal to the Supreme Court of Indonesia is still pending.

Meanwhile, on 9th February, 1989, Man had issued a writ in the present proceedings. The writ was issued pursuant to leave given by Leggatt J on the same day to issue and serve the writ on Mr Haryanto outside the jurisdiction. In addition Leggatt J granted an injunction to restrain Mr Haryanto from taking any step in proceedings in Indonesia or elsewhere than in England to prevent the pursuit of these proceedings. By the writ Man claimed, in addition to injunctions, declarations that the settlement agreement was valid and enforceable and that Mr Haryanto was obliged to refer any dispute or difference arising out of or in connection with the settlement agreement to arbitration in England in accordance with the terms of that agreement. In the Points of Claim served on 11th September, 1989, the relief sought was expanded to include a declaration as to the validity of the acknowledgement of debt and the additional security given in pursuance of the settlement agreement.

The issue of the writ was followed by a number of interlocutory applications and orders in the present proceedings which, so far as I think it is necessary to refer to them at all, I can summarise quite shortly.

First. On 30th August, 1989, Mr Haryanto issued a summons under RSC Order 12 Rule 8 to set aside the order giving leave to serve the writ outside the jurisdiction. The summons was heard by Webster J on 24th November, 1989, when it was argued on behalf of Mr Haryanto that in the light of the decision of the District Court in Jakarta Man had no good arguable case that the settlement agreement was valid or enforceable. After hearing submissions Webster J dismissed the

summons. On 21st December, 1989, Parker LJ dismissed Mr Haryanto's application for leave to appeal against Webster J.'s order.

Second. On 21st December, 1989, Webster J granted injunctions the effect of which was to restrain Mr Haryanto from instituting or continuing any legal proceedings in any jurisdiction other than arbitration proceedings in England brought pursuant to the settlement agreement.

During 1989, however, Mr Haryanto had brought three further sets of proceedings (205/1989, 251/1989 and 404/1989) in the Central Jakarta District Court.

In action 205/1989 Mr Haryanto sought an injunction to prevent Man pursuing proceedings in New Mexico which Man had commenced on 10th February, 1989, claiming relief for alleged breaches of a pledge agreement relating to shares in Mount Taylor Development which had been provided as security under the settlement agreement.

In action 251/1989 Mr Haryanto sought an injunction to restrain Man from taking any action against him in the present proceedings until judgment was given in actions 499/1988 and 736/1988 which were then still pending in the District Court.

In action 404/1989, which was commenced on 18th July, 1989, and therefore after the District Court had given its judgment in actions 499/1988 and 736/1988, Mr Haryanto sought wide-ranging injunctions based on the contention that the disputed contracts, the settlement agreement and all acknowledgements of debt and securities provided

pursuant to the settlement agreement were void and unenforceable. In these proceedings Mr Haryanto also seeks the return with interest of the sum of US$5m. paid on 31st July, 1987, and the further sum of US$46m. which had been released to Man under clause 1(a) of the settlement agreement.

Meanwhile Man had not been idle. On 21st March, 1989, Man notified Mr Haryanto of their intention to commence arbitration proceedings in accordance with the settlement agreement claiming the outstanding balance of US$22m. Mr Haryanto, however, declined to concur in the appointment of an arbitrator and his solicitors indicated that he regarded the settlement agreement and by implication the arbitration clause as invalid. The arbitration proceedings therefore went ahead in this absence and on 17th November, 1989, Man obtained an award in their favour ordering Mr. Haryanto to pay US$22m. plus interest at the rate of 9% from 12th August, 1988. On 30th November, 1989, Hobhouse J gave Man leave to enforce the arbitration award as though it were a judgment. On 18th April, 1990, the Judicial Greffier of the Royal Court of Jersey gave Man leave to register the judgment in accordance with the Judgments (Reciprocal Enforcement) (Jersey) Law 1960.

In addition, as has already been mentioned, Man started proceedings on 10th February, 1989, in New Mexico for relief relating to shares pledged by way of security in accordance with the settlement agreement".

That is the end of the summary which I borrow from Neill, L.J.

To complete the story, it is necessary to add that Steyn, J. had given judgment on the 25th May, 1990, in what Neill, L.J. described as "the present proceedings". Neill, L.J.'s judgment was delivered in the appeal from the judgment of Steyn, J.

For a full understanding of what followed, it is necessary to give some account of what Steyn, J. held. The claim in the action before him was by the respondents for a declaration that the settlement agreement was valid and binding on the appellant. The defence of the appellant to that claim was that the respondent was bound by the decision of the Indonesian Courts that the settlement agreement was void and unenforceable and this issue was accordingly res judicata between the parties.

The respondents replied to this that the decision of the Indonesian Courts was not recognisable in the English Court for two reasons: first, because it was irreconcilable with the decisions of the High Court and the Court of Appeal given in 1985 and 1986 that the contracts of sale were valid and enforceable, and secondly, because it was repugnant to public policy in England.

Steyn, J. concluded first, that the Indonesian judgments had been based on a finding that the contracts for the sale of sugar were illegal by Indonesian law and the settlement agreement was illegal because it flowed from the disputed contracts. Because those Indonesian judgments were thus based on the illegality, as the Indonesian Courts saw it, of the contracts for the sale of sugar, they were irreconcilable with the earlier decisions in England.

Next, Steyn, J. held that it made no difference to this position that the issue of illegality had not been raised in the English proceedings. That issue could have been raised in those

proceedings, had not been, and therefore could not be raised subsequently, and the legality of the contracts for the sale of the sugar was therefore for the purposes of litigation in England res judicata. This res judicata was not affected by the finding of the Indonesian Courts that the contracts of sale were illegal. That finding had been based on Indonesian public policy. The consideration of Indonesian public policy had not been raised in the English proceedings and was one of the issues of which the settlement agreement constituted a bona fide compromise. English public policy required the upholding both of bona fide settlements and of the finality of litigation.

Finally, the learned Judge held that, even if he were wrong about res judicata, English public policy still precluded recognition of the Indonesian judgment. The reason which he gave for this was that the English proceedings prevented the appellant from raising illegality in England subsequently, and, to quote the words which he used, the appellant "switched to the Indonesian forum in order to gain a more favourable result".

Steyn, J. therefore granted a declaration that the settlement agreement was valid and binding on the appellant. This judgment was upheld by the Court of Appeal in England on the 21st December, 1990, (the occasion on which Neill, L.J. delivered his judgment from which I have quoted), and on the 13th March, 1991 the House of Lords dismissed the appellant's petition for leave to appeal against it.

It is now necessary to make some reference to the provisions of the Reciprocal Enforcement Law on which the appellant relied in his application to have the registration set aside. Those provisions are contained in Article 6(1) of the Law. Sub-paragraph (a) of that paragraph provides that a registration 'shall be set aside' if the Royal Court is

satisfied of any of six grounds set out. The appellant relied on one of those, that (and I quote the words of the Law) "the enforcement of the judgment would be contrary to public policy in Jersey".

Sub-paragraph (b) provides not for mandatory but for discretionary setting aside. I read it:

> "The judgment may be set aside if the Royal Court is satisfied that the matter in dispute in the proceedings in the original court had previously to the date of the judgment in the original court been the subject of a final and conclusive judgment by a court having jurisdiction in the matter".

The appellant's case in the Royal Court was as to paragraph (a) that enforcement of the settlement agreement would be contrary to public policy in Jersey because that agreement had been held to be illegal and unenforceable by the Indonesian Courts.

His case under paragraph (b) was that previously to the judgment of Hobhouse, J. there had been two final and conclusive judgments by courts having jurisdiction in the matter; that is to say, the respective judgments of the English Courts and the Indonesian Courts. The appellant's submission was that in exercising its discretion under sub-paragraph (b) the Jersey Court had to carry out a balance between these judgments and in this balance the Indonesian judgment should preponderate.

When the case became before the Royal Court on the 20th July, 1990, it seems that the argument turned principally not on either of these submissions, but on a different point. At that time the appellant's appeal to the English Court of Appeal

against the judgment of Steyn, J. was pending. It was submitted on his behalf that, if that appeal were to succeed, he would be entitled to have the judgment of Hobhouse, J. set aside in England; and the Royal Court should therefore adjourn his application to set aside the registration of that judgment until judgment had been given by the English Court of Appeal.

This submission the Royal Court rejected. It no longer arises since the judgment of the Court of Appeal in England has long since been given and indeed the application to the House of Lords for leave to appeal against it has been dismissed.

Mr. Clapham admitted in argument before us that on the 20th July before the Royal Court his argument had been concentrated on his request for an adjournment. He said he had submitted to the Royal Court that if there were no adjournment the Court should set aside the registration of the judgment of Hobhouse, J., but he agreed that he had not argued this very strongly.

That no doubt is the reason why the Royal Court in its judgment of the 2nd August did not deal at all extensively with the issue of whether the registration of Hobhouse, J.'s judgment should be set aside.

The Court did refer to sub-paragraph (a) of Article 6(1), but only to say that it did not apply, and Mr. Clapham in fact admitted that he had addressed no argument to the Court on sub-paragraph (a). In what must have been a reference to sub-paragraph (b), the Court said that they recognised they had (and I quote) "a discretion whether or not to set aside the judgment on the basis of the Indonesian judgment". They merely said in relation to this that they declined to set the registration aside.

In his submissions to this Court Mr. Clapham renewed what had been his case in the Royal Court, both under sub-paragraph (a) and after sub-paragraph (b). He submitted under sub-paragraph (a) that the registration of the judgment of Hobhouse, J. constituted enforcement of the settlement agreement, and such enforcement would be contrary to public policy in Jersey because the settlement agreement had been held to be illegal by the Indonesian Courts.

We have not seen the Indonesian judgments, but from references to them in the English proceedings it seems clear that the Indonesian Courts held to be illegal and unenforceable not only the contracts for the sale of the sugar, but also the settlement agreement. The significance of these two findings for this Court, however, is by no means the same. The contracts for the sale of sugar were contracts to be performed in Indonesia. A judgment of an Indonesian Court holding such a contract to be illegal will normally be recognised by the Courts of Jersey. It is a judgment of a court having jurisdiction at the place of performance and declaring that in that place performance will be against the law.

It may well be that the enforcement of such a contract, so held to be illegal, would be contrary to public policy in Jersey. The position of the settlement agreement, however, is quite different. The settlement agreement provided that payments of money due under it were to be made in London. Arbitration under it was to take place in London. It was expressed to be governed by English law. It was thus clearly a contract the place of performance of which was England. The position therefore is that this contract, which was to be performed in England, has never been held illegal by the courts of the place of performance, nor has it ever been held to be illegal under the law which governs it. We see no reason why

the enforcement of such a contract should be contrary to public policy in Jersey merely because it has been held to be illegal by an Indonesian Court according to Indonesian law.

The appellant's claim for mandatory setting aside of the registration under sub-paragraph (a) therefore fails.

The appellant's argument under sub-paragraph (b) began with a distinction between the position of the English Courts and the position of this Court. In the English Courts, Mr. Clapham said, it was impossible to give any recognition to the Indonesian judgments holding the contracts of sale unenforceable because there had been earlier judgments in England to a contrary effect. Here by contrast, he said, the English judgments and the Indonesian judgments are both foreign judgments and have merely to be balanced against each other, and as an exercise of the Court's discretion the Indonesian judgments in that balancing should be allowed to prevail.

We agree with Mr. Clapham's submission that in Jersey the English judgments and the Indonesian judgments are both foreign judgments. We do not agree that in exercising the discretion under sub-paragraph (b) in this case the Courts of Jersey should allow any effect to the Indonesian judgments. We say this because of the circumstances in which the appellant invoked the Indonesian jurisdiction.

When the original English action was before Staughton, J. in March, 1986, 'a considered decision' (I take the expression used by Steyn, J.) was taken on the appellant's behalf not to raise the issue of the illegality of the contracts of sale. The appellant failed before Staughton, J., and the Court of Appeal dismissed his appeal on the 5th March, 1986.

On the 25th March, the appellant issued a new writ in the Commercial Court claiming for the first time that the contracts of sale were illegal. The next day (26th March, 1986) he asked the Court of Appeal to modify the declaration which it was proposing to make on the ground that that declaration might prevent him from arguing, either before an arbitrator or in a court, that the contracts of sale were illegal. The Court of Appeal refused to modify the declaration in any way.

Thereafter, the appellant did not press on with the action in which he was alleging the illegality of the contracts of sale. Instead, on the 7th July, 1986, he entered into the settlement agreement. This agreement was undoubtedly a bona fide compromise of issues between the parties, including the issue of the alleged illegality of the contracts of sale.

So far from regarding the settlement agreement as illegal, the appellant in fact paid $5,000,000 under it on 31st July, 1987. When the second instalment of $9,000,000 fell due on the 31st July, 1988, he failed to pay it. On the 3rd August, the respondent's solicitors claimed, under the acceleration clause contained in the settlement agreement, that the whole outstanding balance under the settlement agreement of $22,000,000 was immediately payable; and it was a few days after that, on the 8th August, 1988, that the appellant started the first Indonesian proceedings in which he alleged the illegality of the contracts of sale.

In my judgment it is perfectly clear from this recital that the appellant was indulging in forum shopping of the most reprehensible description. No encouragement should be given to such conduct. In particular, judicial discretion should not be exercised to favour such conduct in any way. It is for this reason that in my judgment no regard can be paid in this case to

the Indonesian judgments in the exercise of the discretion under Article 6(1)(b).

It follows that the appellant's claim under sub-paragraph (b) like his claim under sub-paragraph (a) must fail. I therefore conclude that this appeal must be dismissed.

Authorities

Judgments (Reciprocal Enforcement) (Jersey) Law, 1960.

Judgments (Reciprocal Enforcement) (Jersey) Rules, 1961.

Judgments (Reciprocal Enforcement) (Jersey) Act, 1973.

The Supreme Court Practice 1991, O.71. rr. 5-14.

Royal Court Rules, 1982 (as amended) Rule 8/3.

The Supreme Court Practice 1991 O.13 r.9.

The Supreme Court Practice 1991 O.73 r.10.

The Supreme Court Practice 1991 O.3 r.5.

Court of Appeal (Jersey) Law, 1961 (as amended).

Court of Appeal (Civil) (Jersey) Rules, 1964 (as amended).

Cutner -v- Green (1980) JJ 269.

Abdel Rahman -v- Chase Bank (C.I.) Trust Co. Ltd. and others (1984) JJ 127.

Lane -v- Lane (1985-86) JLR 48.

Vervaeke -v- Smith (1983) AC 145.

Yat Tung Investment Co Limited -v- Dao Heng Bank (1975) AC 581.